

16-90087-jm, 16-90092-jm, 16-90112-jm to 16-90114-jm

January 19, 2017

Chief Judge

**JUDICIAL COUNCIL OF THE  
SECOND CIRCUIT**

-----X

In re  
CHARGES OF JUDICIAL MISCONDUCT

Docket Nos.    16-90087-jm  
                         16-90092-jm  
                         16-90112-jm  
                         16-90113-jm  
                         16-90114-jm

-----X

ROBERT A. KATZMANN, *Chief Judge*:

On July 28, September 6, November 8, 14, and 23, and December 14, 2016, the Complainant filed five complaints and three supplemental complaints with the Clerk’s Office of the United States Court of Appeals for the Second Circuit pursuant to the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351-364 (the “Act”), and the Rules for Judicial-Conduct and Judicial-Disability Proceedings, 249 F.R.D. 662 (U.S. Jud. Conf. 2008) (the “Rules”), charging a district judge (the “District Judge”) and four appellate judges—three circuit judges and a district judge sitting by designation—of this Circuit (collectively, the “Judges”) with misconduct.

## **BACKGROUND**

Beginning in 2011, the Complainant filed a series of age discrimination lawsuits against the defendant. The District Judge dismissed the first two complaints in 2012 and 2014. The District Judge dismissed the next complaint as duplicative and frivolous and enjoined the Complainant from filing further actions against the defendant without prior approval.

In June 2016, following oral argument, the court of appeals vacated the dismissal of one claim from the Complainant's 2011 complaint and remanded for further proceedings, but otherwise affirmed the three dismissals. The court of appeals also affirmed the District Judge's leave-to-file sanction and warned the Complainant that future frivolous filings may result in additional sanctions.

On remand, the District Judge did not grant the Complainant's request for a conference and denied his requests for a stay and injunctive relief. In November 2016, a court of appeals panel composed of two circuit judges and a district judge sitting by designation (the "Panel") dismissed as frivolous the Complainant's appeal from the District Judge's ruling and again warned him of the possibility of sanctions for continued frivolous filings. That same day, the

District Judge scheduled a hearing for January 2017 on the defendant's motion for sanctions and to hold the Complainant in contempt for filing motions in violation of the leave-to-file sanction. The District Judge denied the Complainant's later request to move for sanctions and to hold the defendant in contempt. She denied as futile his request to move for her recusal from the upcoming contempt hearing because it was based only on her "action or lack of action in his case." The action remains pending in the district court.

In 2012 and 2013, the Complainant filed eleven misconduct complaints related to these proceedings—four complaints against the District Judge based on her handling of his cases, and the remainder against four circuit judges not named in the instant complaints. Seven of his complaints alleged systemic bias against pro se litigants by the District Judge or by the court of appeals. All eleven complaints were dismissed as merits related or unsupported. In 2013, the Complainant was warned that the filing of repetitive or frivolous complaints, or other abuse of the complaint procedure, may result in restrictions on filing.

The complaint and the three supplemental filings in 16-90087 repeat allegations of bias by the District Judge against pro se litigants; they also allege

that the District Judge; [i] retaliated against the Complainant for his filing of misconduct complaints and the partial vacatur of her decision on appeal; [ii] violated his rights to due process and a fair hearing; [iii] refused to schedule a conference on remand; [iv] was “tipped off” (by members of the Panel) about the November 2016 dismissal of his appeal so that she could “rule quickly in retaliation” for his prior misconduct complaints; [v] lacked jurisdiction to schedule the contempt hearing prior to issuance of the court of appeals’ mandate; [vi] improperly ignored, denied, or prevented the Complainant from filing certain motions, failed to give him adequate notice of her rulings, and improperly granted requests by defense counsel; and [vii] failed to seek clarification from the court of appeals regarding how to proceed on remand prior to scheduling the contempt hearing. The Complainant additionally requests that the District Judge recuse herself from presiding over the contempt hearing.

The complaint in 16-90092 names one of the circuit judges who sat on the June 2016 court of appeals panel (the “Circuit Judge”). It alleges that the Circuit Judge: [i] denied the Complainant the right to be heard at oral argument and was biased against him based on his pro se status; [ii] cut the Complainant “off short”

at argument and told him “in strong words” that his argument would be unsuccessful if he “proceeded with . . . commentary which was critical of the Court”; and [iii] denied the Complainant his rights to due process and a fair hearing by preventing him from criticizing the court of appeals’ approach to pro se litigation. The complaint repeats allegations that the court of appeals routinely treats pro se litigants in an unfair manner and improperly characterizes their arguments as frivolous.

The three, nearly identical complaints in 16-90112, 16-90113, and 16-90114 are lodged against the members of the November 2016 Panel. The complaints argue that the Panel was biased against the Complainant based on his pro se status, as demonstrated by [i] its dismissal of his meritorious appeal, [ii] the use of words in its decision like “frivolous,” “without merit,” and “duplicative,” and [iii] the warning about sanctions. The complaint also alleges that the Panel’s ruling included inconsistent statements and ignored the Complainant’s arguments and established case law.

## **DISCUSSION**

The complaints are dismissed.

The allegations of bias against the Complainant based on his pro se status, as well as systemic bias against all pro se litigants, are dismissed for the reasons stated in the orders dismissing 12-90027-jm, et al., and 13-90051-jm—i.e., as “lacking sufficient evidence to raise an inference that misconduct has occurred.” 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(D).

Most of the remaining allegations seek merely to challenge the correctness of the Judges’ various decisions and official actions in the underlying proceedings. What these allegations contend is that the Judges got it wrong, not that they engaged in judicial misconduct. Accordingly, these allegations are dismissed as “directly related to the merits of a decision or procedural ruling.” 28 U.S.C. § 352(b)(1)(A)(ii); Rule 3(h)(3)(A) (“An allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse, without more, is merits-related.”). In particular, allegations attacking the language or reasoning contained in a judge’s decision are quintessentially merits related. *See In re Mem. Dec. Judicial Conference Comm. Judicial Conduct and Disability*, 517 F.3d 558, 562 (U.S. Jud. Conf. 2008) (noting that “[t]he merits of a decision and the reasons given or not given for it are often inseparable,” and holding accordingly that “the

giving or not giving of reasons for a particular decision, like the reasons themselves, should not be the subject of a misconduct proceeding”). Purely merits-related allegations are excluded from the Act to “preserve[] the independence of judges in the exercise of judicial power by ensuring that the complaint procedure is not used to collaterally attack the substance of a judge’s ruling.” Rule 3 cmt. Such challenges can be pursued, to the extent the law allows, only through normal appellate procedures.

The allegations of retaliation by the District Judge appear entirely derivative of the merits-related charges, but to the extent these allegations are separate, they are wholly unsupported, and are also dismissed as “lacking sufficient evidence to raise an inference that misconduct has occurred.” 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(D). A decision for or against a party does not evidence bias. Nor do several such decisions.

The complaint in 16-90092 also takes issue with the Circuit Judge’s demeanor at oral argument. While a judge should be “patient, dignified, respectful, and courteous” to litigants and lawyers, Code of Conduct for United States Judges Canon 3(A)(3), and while misconduct can include “treating litigants

or attorneys in a demonstrably egregious and hostile manner,” Rule 3(h)(1)(D), the behavior at issue must “transcend[] the expected rough-and-tumble of litigation” in order to “move[] into the sphere of cognizable misconduct” under the Act, *Implementation of the Judicial Conduct and Disability Act of 1980, A Report to the Chief Justice*, 239 F.R.D. 116, 241 (Sept. 2006); cf. *Liteky v. United States*, 510 U.S. 540, 555-56 (1994) (holding that “expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display” do not establish bias or partiality).

The audiotape of the appellate argument reveals that the Complainant began by complaining that counseled parties received ten minutes for argument while he, as a pro se litigant, received only five; he argued that this was a denial of access to the courts for all pro se litigants. The Circuit Judge advised the Complainant that his adversary, who was not pro se, had been limited to five minutes as well, and then stated, “You’re really doing a wonderful job advancing your interests in this case,” and asked the Complainant whether he wanted “to talk about the subject matter of the case” or “to advance [his] suit against [the

court of appeals] for discriminating” against him. The remainder of the argument focused on the merits of the Complainant’s appeal.

Although the transcript suggests impatience by the Circuit Judge with the Complainant’s initial failure to focus on the merits of his case, it also reveals that the Complainant received an opportunity to argue and present his case. It is not uncommon for a judge to provide the parties with a blunt assessment of the judge’s views on the merits of their arguments. The Circuit Judge’s comments at argument do not “transcend[] the expected rough-and-tumble of litigation,” and therefore do not constitute misconduct under the Act.

The Complainant is again warned that his continued abuse of the judicial misconduct complaint process will likely result in the imposition of restrictions or conditions on its use. *See* Rule 10(a) (“A complainant who has filed repetitive, harassing, or frivolous complaints, or has otherwise abused the complaint procedure, may be restricted from filing further complaints.”).

The Clerk is directed to transmit copies of this order to the Complainant and to the Judges.